United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 20-0496**
	)	**Issued: August 13, 2020**
DEPARTMENT OF AGRICULTURE, U.S. FOREST SERVICE, CIBOLA NATIONAL FOREST, SANDIA RANGER DISTRICT, Tijeras, NM, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 3, 2020 appellant filed a timely appeal from a September 23, 2019 merit decision and a December 4, 2019 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence to OWCP following the December 4, 2019 decision, and on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met his burden of proof to establish a right upper thigh injury causally related to the accepted July 18, 2019 employment incident; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On July 18, 2019 appellant, then a 37-year-old supervisory forestry technician, filed a traumatic injury claim (Form CA-1) alleging that on that date he sustained a right upper thigh injury when running in a grass field as part of his daily physical training while in the performance of duty. He did not immediately stop work.

On July 18, 2019 appellant was treated by Lyn Dawson, a nurse practitioner, for a right quad injury which occurred that morning while running at work. An x-ray of the right knee was negative. Ms. Dawson diagnosed strain of the muscle of posterior right lower leg.

In a report dated July 23, 2019, Lisa Grimaldi, a physician assistant, treated appellant on follow up for a right posterior upper leg injury. She reported pain when walking uphill or descending stairs. Ms. Grimaldi diagnosed hamstring strain, right sequela, and sprain of the muscle of posterior right lower leg. In a physician work activity status report dated July 23, 2019, she diagnosed strain of the muscle tendon of the posterior muscle group of lower right leg, initial encounter and strain of the muscle, fascia and tendon of the posterior muscle group at thigh level, and right thigh, sequela. Ms. Grimaldi returned appellant to work with restrictions. In a duty status report (Form CA-17) of even date, she diagnosed hamstring strain and continued appellant on light-duty work.

Appellant attended physical therapy treatment on July 23 and 26, 2019.

Appellant was treated by Steven Cardenas, a physician assistant, on July 30, 2019, who diagnosed hamstring strain, right, sequela. Mr. Cardenas saw appellant for a recheck on August 6, 2019 and reported improvement in his right leg condition with only occasional soreness. He diagnosed hamstring strain, right, sequela and returned appellant to work for a trial of regular duty. Appellant was seen in a follow up on August 13, 2019 for the right hamstring injury and reported feeling better and that he was ready to be released from care. Mr. Cardenas diagnosed strain of the muscle of posterior right lower leg and released appellant to full-duty work.

In an August 22, 2019 development letter, OWCP advised that, when appellant's claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time for work. Therefore, payment of a limited amount of medical expenses was administratively approved without formal consideration of the merits of his claim. OWCP reopened appellant's claim for consideration of the merits and requested medical evidence. It specifically noted that there was no diagnosis of a medical condition resulting from the alleged injury. OWCP advised that the medical evidence must be submitted by a qualified physician and must contain a valid medical diagnosis. It noted that a finding of "pain" is a symptom, not a valid diagnosis. OWCP afforded appellant 30 days to respond. No response was received within the time allotted.

By decision dated September 23, 2019, OWCP accepted that the July 18, 2019 employment incident occurred, as alleged. However, it denied appellant's traumatic injury claim, finding that he had not submitted evidence containing a medical diagnosis in connection with the accepted employment incident. Consequently, OWCP found that the requirements had not been met to establish an injury as defined by FECA.

Appellant requested reconsideration on October 21, 2019. In an accompanying statement dated October 16, 2019, he reiterated that he was injured on July 18, 2019 while running during daily physical training at work. Appellant reported hearing a "pop" and experiencing pain in his rear right leg causing him to stop running.

In support of his request, appellant submitted: a report from Ms. Dawson dated July 18, 2019; a report from Ms. Grimaldi dated July 23, 2019; reports from Mr. Cardenas dated July 30 to August 13, 2019; and physical therapy notes dated July 23, 2019, all previously of record.

On August 8, 2019 appellant attended physical therapy treatment.

By decision dated December 4, 2019, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT-- ISSUE 1

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation of FECA,[4] that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.[7] Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[8] The second component is whether the employment incident

[3] *Id.*

[4] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *K.M.*, Docket No. 15-1660 (issued September 16, 2016).

[7] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[8] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

caused a personal injury.[9] An employee may establish that an injury occurred in the performance of duty, as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the employment incident.[10]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[11] A physician's opinion on whether there is causal relationship between the diagnosed condition and the accepted employment incident must be based on a complete factual and medical background.[12] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and the specific employment incident.[13]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted July 18, 2019 employment incident.

In support of his claim, appellant submitted reports signed by Ms. Grimaldi and Mr. Cardenas, both physician assistants, who treated appellant for a right upper thigh injury. He was also treated by Ms. Dawson, a nurse practitioner, for a right quad injury. Additionally, appellant submitted physical therapy treatment notes. Certain healthcare providers such as physician assistants, nurse practitioners,[14] and physical therapists[15] are not considered physicians as defined under FECA.[16] Consequently, these reports will not suffice for purposes of establishing entitlement to FECA benefits.[17]

[9] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[10] *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[11] *T.H.*, *supra* note 7; *Robert G. Morris*, 48 ECAB 238 (1996).

[12] *M.V.*, Docket No. 18-0884 (issued December 28, 2018).

[13] *Id.*; *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[14] *S.J.*, Docket No. 17-0783 n. 2 (issued April 9, 2018) (nurse practitioners are not considered physicians under FECA).

[15] *V.W.*, Docket No. 16-1444 (issued March 14, 2017) (where the Board found that physical therapy reports do not constitute competent medical evidence because a physical therapist is not a "physician" as defined under FECA).

[16] 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

[17] Section 8101(2) of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); *C.P.*, Docket No. 19-1716 (issued March 11, 2020) (a physician assistant is not a physician as defined under FECA).

The Board finds that there is no evidence of record that establishes a valid medical diagnosis from a qualified physician in connection with the accepted employment incident. Consequently, appellant has not established that he sustained a medical condition causally related to the accepted July 18, 2019 employment incident.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

On appeal appellant asserts that he submitted sufficient medical evidence signed by a physician in support of his claim for compensation. However, as explained above, there was no rationalized medical evidence by a physician of record at the time OWCP issued its December 4, 2019 decision. As such, appellant has not met his burden of proof.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.[18]

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.[19]

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.[20] If it chooses to grant reconsideration, it reopens and reviews the case on its merits.[21] If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.[22]

[18] 5 U.S.C. § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

[19] 20 C.F.R. § 10.606(b)(3); *see also E.W.*, Docket No. 19-1393 (issued January 29, 2020); *L.D., id.*; *B.W.*, Docket No. 18-1259 (issued January 25, 2019).

[20] *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

[21] *Id.* at § 10.608(a); *see also Y.H.*, Docket No. 18-1618 (issued January 21, 2020); *R.W.*, Docket No. 18-1324 (issued January 21, 2020); *M.S.*, 59 ECAB 231 (2007).

[22] *Id.* at § 10.608(b); *D.C.*, Docket No. 19-0873 (issued January 27, 2020); *M.S.*, Docket No. 19-0291 (issued June 21, 2019).

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant has not alleged or demonstrated that OWCP erroneously applied or interpreted a specific point of law. Moreover, he has not advanced a relevant legal argument not previously considered. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).[23]

Further, appellant has not provided relevant and pertinent new evidence in support of his request for reconsideration. The underlying issue is whether he submitted sufficient medical evidence to establish a medical condition causally related to the accepted July 18, 2019 employment incident. This is a medical issue which must be determined by rationalized medical evidence.[24] On reconsideration appellant submitted a report from Ms. Dawson dated July 18, 2019; a report from Ms. Grimaldi dated July 23, 2019; reports from Mr. Cardenas, dated July 30 to August 13, 2019; and physical therapy notes dated July 23, 2019. The Board notes that these reports were previously addressed and evaluated by OWCP in its September 23, 2019 merit decision. As the reports are duplicative and repeated evidence already in the case record, they do not constitute a basis for reopening the case.[25] Appellant also submitted new physical therapy notes dated August 8, 2019. As noted, physical therapists are not considered physicians as defined under FECA and thus their reports do not constitute competent medical evidence.[26] The physical therapy notes are therefore irrelevant to the underlying merit issue. As appellant did not provide relevant and pertinent new evidence, he is not entitled to a merit review based on the third requirement under 20 C.F.R. § 10.606(b)(3).[27]

The Board, accordingly, finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.[28]

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a medical condition causally related to the accepted July 18, 2019 employment incident. The Board further

[23] *M.O.*, Docket No. 19-1677 (issued February 25, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

[24] *See J.B.*, Docket No. 18-1531 (issued April 11, 2019); *E.D.*, Docket No. 18-0138 (issued May 14, 2018); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[25] *J.S.*, Docket No. 18-0726 (issued November 5, 2018).

[26] 5 U.S.C. § 8101(2); *J.M.*, 58 ECAB 448 (2007); *G.G.*, 58 ECAB 389 (2007); *David P. Sawchuk*, 57 ECAB 316, 322 n.11 (2006); *Allen C. Hundley*, 53 ECAB 551 (2002).

[27] 20 C.F.R. § 10.606(b)(3)(iii); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

[28] *D.G.*, Docket No. 19-1348 (issued December 2, 2019).

finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the December 4 and September 23, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 13, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board